IN THE COURT OF APPEALS OF IOWA

No. 6-872 / 06-0072
Filed December 13, 2006

GARY R. TITUS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert, Judge.

Applicant appeals following denial of his third application for postconviction relief. **AFFIRMED.**

John Billingsley of Walker & Billingsley, Newton, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, John P. Sarcone, County Attorney, and Steve Foritano, Assistant County Attorney, for appellee State.

Considered by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

ZIMMER, J.

Gary Titus appeals following the district court's denial of his application for postconviction relief, which asserted that trial counsel was ineffective for failing to object to prosecutorial misconduct. Upon our de novo review, *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999), we affirm the district court.

In 1988 Titus was convicted of murder in the first degree. His conviction was upheld on direct appeal. *State v. Titus*, No. 88-1070 (Iowa Ct. App. Dec. 27, 1989). Titus unsuccessfully sought postconviction relief in 1990 and 1992.[1] He filed the present application for postconviction relief on July 14, 2004.

The application alleged trial counsel had been ineffective for failing to object to questions posed by the prosecutor during cross-examination of Titus, which had inquired into the veracity of State witnesses. It asserted the questioning was objectionable because it amounted to prosecutorial misconduct under the rule announced in *State v. Graves*, 668 N.W.2d 860 (Iowa 2003).[2] It further asserted the application was timely, even though it was filed nearly fifteen years after procedendo issued in the direct appeal, because *Graves* had announced a new rule of law. *See* Iowa Code § 822.3 (2003) (requiring application to be filed within three years of date decision is final or procedendo is

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[1] Both applications for postconviction relief were denied by the district court. The denial of the 1990 application was upheld on appeal. *Titus v. State*, No. 91-1528 (Iowa Ct. App. Oct. 27, 1992). Titus did not appeal from the denial of the 1992 application.

[2] Although Titus's application for postconviction relief and his appellate brief appear to make alternate claims of a due process violation and ineffective assistance of counsel, the district court's ruling stated that Titus's "sole basis for seeking postconviction relief" was a claim of ineffective assistance of trial counsel. Titus did not file a posttrial motion asking the court to rule on a separate due process claim. Accordingly, we limit our consideration to the issue that was both presented to and ruled on by the district court. *See Meier v. Senecaut*, 641 N.W.2d 532, 539 (Iowa 2002).

issued, unless application is based on "a ground of fact or law that could not have been raised within the applicable time period").

Following hearing, the district court denied Titus's application. On appeal, Titus again asserts that trial counsel was ineffective for failing to object to questioning that amounted to prosecutorial misconduct. To establish such a claim, Titus must demonstrate that his attorney's performance fell below "an objective standard of reasonableness" and that "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984).

Having reviewed the record and relevant case law, we conclude the district court properly denied Titus's claim. We agree with the court that this matter is governed by *State v. Bayles*, 551 N.W.2d 600 (Iowa 1996), which addressed for the first time the issue of whether a prosecutor may question a defendant about the veracity of other witnesses. The court noted a split of authority in other jurisdictions as to whether such questioning amounted to prosecutorial misconduct, but determined it need not decide the question in order to address the defendant's ineffective assistance of counsel claim:

> [B]efore our decision in this case, there was nothing in our statutes, rules, or case law imposing a duty on defense counsel to object to the cross-examination questions at issue here. A claim for ineffective assistance of counsel will not lie when the law governing the issue complained of is unsettled at the time the cause is tried.

Bayles, 551 N.W.2d at 610.

The questioning at issue here occurred some eight years prior to the *Bayles* decision. If the counsel in *Bayles* could not be found ineffective in light of

the unsettled state of the law, we see no basis for reaching the opposite conclusion in this matter.

Titus contends his trial counsel can be deemed ineffective for failing to foresee a change in the law, given that trial counsel in *Graves* was found ineffective. He points to language in *Graves* that noted "'trial counsel's failure to raise an issue of first impression cannot be excused as a judgment call left to the discretion of trial counsel.'" *Graves*, 668 N.W.2d at 882 (citation omitted). This language must, however, be read in context.

In *Graves*, the supreme court determined that "counsel could not have reasonably concluded that objections to the prosecutor's cross-examination . . . were not worth making" because *Bayles* had alerted counsel to the issue. *Id*. Here, in contrast, reasonably competent counsel would not necessarily anticipate that such statements could be deemed prosecutorial misconduct. *See State v. Liddell*, 672 N.W.2d 805, 814 (Iowa 2003) ("'Counsel need not be a crystal gazer; it is not necessary to know what the law will become in the future to provide effective assistance of counsel.'" (citation omitted)). Titus has accordingly failed to establish the ineffective assistance of his trial counsel. The district court ruling denying Titus's application for postconviction relief is affirmed.

AFFIRMED.